

No. 9916.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO APPELLANT'S OPENING
BRIEF.

MORRIS LAVINE,

619 Bartlett Building, Los Angeles,

Attorney for Appellant.

FILED

JUL 6 - 1942

TOPICAL INDEX.

	PAGE
Statement of jurisdiction on appeal.....	1
Fourteenth count	2
Fifteenth count	4
Sixteenth count	6
Nature of case and rulings below.....	10
Cases and sections believed to sustain jurisdiction.....	15

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Electric Bond & Share Co. v. Securities & Exchange Commission, 92 Fed. (2d) 580.....	15
United States v. American Bell Telephone Co., 159 U. S. 548, 40 L. Ed. 255.....	15
United States v. Sanges, 144 U. S. 310, 36 L. Ed. 450.....	15
Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 48 L. Ed. 496.....	15

STATUTES.	PAGE
Criminal Code, Sec. 37 (18 U. S. C., Sec. 88).....	2
Criminal Code, Sec. 215 (18 U. S. C., Sec. 338).....	2
Constitution of the United States, Fifth Amendment.....	12
Judicial Code, Sec. 128(a).....	1
United States Code, Annotated, Title 1, Sec. 22 (Chap. 38, 48 Stat. 86; Chap. 804, 49 Stat. 1921).....	1, 11, 15
United States Code, Annotated, Title 15, Sec. 77v.....	1
United States Code, Annotated, Title 28, Sec. 225 (43 Stats. at L. 936, 347).....	1, 15
Securities Act of 1933, Sec. 5(a)(2) (15 U. S. C., Sec. 77q (a) (2))	1

No. 9916.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction on Appeal.

In compliance with Rule 20, appellant herewith presents his statement of jurisdiction on appeal.

A.

The statutory provisions which sustain jurisdiction are section 128(a) Judicial Code as amended, 28 U. S. C. A. section 225 (43 Stat. L. 936 and 347), and Title 15, section 77v (C. 38 Title I, section 22, 48 Stat. 86; C. 804, 49 Stat. 1921).

B.

The indictment in this case charges as follows:

(Caption) Viol. Section 5(a) (2), Securities Act of 1933, as amended (Title 15, United States Code, Section

77q(a) (2), Section 37, Criminal Code (Title 18, United States Code, Section 88), Section 215, Criminal Code (Title 18, United States Code, Section 338). (Note: This heading seems inapplicable to Counts 14, 15 and 16.)

In the District Court of the United States in and for the Southern District of California, Central Division.
[R. 2.]

Fourteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore, on or about December 21, 1936, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, knowingly, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate, No. 732, for 250 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Dr. Homer J. Arnold and Florence R. Arnold, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to-wit:

Said defendants on or about December 21, 1936, caused to be delivered by the Post Office establishment of the

United States according to the directions thereon, a post-paid envelope addressed to Dr. Homer J. and Florence R. Arnold, 345 South Norton, Los Angeles, California, enclosing said security, which said security was of the following tenor, to-wit:

“Number 732 Shares ** 250 **

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value

Fully Paid, Fully Voting and Non-assessable

This Certifies that Homer J. Arnold and Florence R. Arnold, Joint Tenants, with full rights of Survivorship is the registered holder of Two Hundred Fifty Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated ‘the Corporation,’ transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 14th day of December, A. D. 1936.

H. L. WIKOFF,
President.

FRANK S. TYLER,
Secretary.

For value received.....hereby
sell, assign and transfer unto.....
shares of the capital stock represented by the within
certificate, and do hereby irrevocably constitute and
appoint, Attorney
to transfer the said stock on the books of the within
named corporation with full power of substitution
in the premises.

Dated.....
.....

In the presence of
.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever.”

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fifteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore on or about June 3, 1937, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, wilfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certi-

ificate number 741, for 30 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Regina Woodruff, no registration statement being in effect as to such security, and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to-wit:

(Insert after the word "to-wit" at end of first paragraph on page 5.)

Errata.

Said defendants on or about June 3, 1937 caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a post-paid envelope addressed to Mrs. Regina Woodruff, 802 North Vermont, Los Angeles, California, enclosing said security, which said security was of the tenor following, to-wit:

_____ designated the Corporation, transferable on the share register of the corporation upon surrender of the certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 13th day of May, A. D. 1937.

H. L. WIKOFF,
President.

FRANK S. TYLER,
Secretary.

For value received hereby
sell, assign and transfer unto.....
shares of the capital stock represented by the within
certificate, and do hereby irrevocably constitute and
appoint Attorney
to transfer the said stock on the books of the within
named corporation with full power of substitution
in the premises.

Dated.....
.....

In the presence of
.....

Notice: The signature to this assignment must
correspond with the name as written upon the face
of the certificate in every particular, without altera-
tion or enlargement or any change whatever.”

Contrary to the form of the statute in such case made
and provided and against the peace and dignity of the
United States of America.

Sixteenth Count.

And the grand jurors aforesaid, upon their oath afore-
said, do further present and show that the defendants Wil-
liam Jackson Shaw, also known as W. J. Shaw, and
Frank S. Tyler, heretofore on or about June 8, 1937, at
Los Angeles, County of Los Angeles, state, division and
district aforesaid, and within the jurisdiction of the United
States and of this Honorable Court, wilfully, knowingly,
unlawfully and feloniously did cause to be delivered by
the United States mails a certain security, to-wit: a certi-

ificate, number 742, for 18 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to J. C. and E. M. Goodrich, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to-wit:

Said defendants on or about June 8, 1937, caused to be delivered by the Post Office Establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mr. J. C. and E. M. Goodrich, 4532 South Wilton Street, Los Angeles, California, enclosing said security, which said security was of the tenor following, to-wit:

“Number 742 Shares 18

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value

Fully Paid, Fully Voting and Non-assessable

This Certifies that J. C. Goodrich and E. M. Goodrich, Joint Tenants with full right of survivorship is the registered holder of Eighteen Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated ‘the Corporation,’ transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the

holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the Seal of the Corporation and the signatures of its duly authorized officers, this 8th day of June, A. D. 1937.

H. L. WIKOFF,
President.

FRANK S. TYLER,
Secretary.

For value received hereby sell, assign and transfer unto..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In the presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever.”

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [R. 56-64.]

C.

The defendant Shaw entered a plea in abatement [R. 70] on the ground that he was called as a witness for the Government in an investigation by the Securities and Exchange Commission and was thereafter immune from prosecution by reason of said facts [R. 70]. A demurrer to the plea in abatement on the grounds that the plea in abatement failed to state facts sufficient to constitute a valid plea in abatement for the reason that it does not appear from the said plea that the defendant was compelled to testify or that he claimed the privilege, was sustained, and a motion to strike the plea in abatement [R. 91, 92] was granted [R. 97-103].

Defendant's demurrer to the indictment on the grounds that it failed to state alleged facts sufficient to constitute an offense under the laws of the United States and failed to inform the accused of the nature and cause of the accusation against him with certainty, and upon other grounds therein set forth, was presented to the Court [R. 77] on April 8, 1940, and overruled by the Court and exception noted as to each ground therein expressed [R. 96].

The defendant entered a plea of not guilty on June 17, 1940 [R. 103, 104], the cause came on for trial on June 17, 1941 in the District Court of the United States, Southern District of California, Central Division, the Honorable Leon R. Yankwich, Judge Presiding. The Court asked the defendant if he was able to proceed and the defendant stated that "he is not able to hire counsel because he is a pauper." The Court thereupon appointed C. C. Montgomery, Esq. as attorney for the defendant and the case proceeded forthwith [R. 105].

The verdict of the jury acquitted the defendant of counts 1 to 13 and not involved in this appeal, and convicted him of counts 14, 15 and 16 as above set forth on July 9, 1941.

The motion for a new trial came on for hearing on July 11, 1941. The Court overruled the motion for a new trial and exception was noted [R. 111].

The Court on September 15, 1941, sentenced the defendant to six months imprisonment upon each of the counts, 14, 15 and 16, to run concurrently [R. 112, 113].

On the same day and date notice of appeal was duly and regularly filed by the appellant to the Circuit Court of Appeals [R. 113]; within the time allowed by law a bill of exceptions was duly and regularly signed and approved by the Honorable Leon R. Yankwich [R. 575], together with assignment of errors [R. 115].

D.

Nature of Case and Rulings Below.

The appellant is sentenced to six months imprisonment on a charge of causing a letter to be mailed from one address in Los Angeles County to another address within the county, which contained a stock certificate of a California Corporation duly and regularly licensed under the laws of the State of California to do business within the state, and whose permit and dealings were a matter of publicity and public record in the State of California and had been approved as to its fairness and honesty to transact business within the state.

The first issue presented in the case is whether an indictment charging a defendant with merely causing a let-

ter to be mailed which contained stock of a state corporation doing business within the state, from one place within a county in the state to another place in the same county, states a public offense, under the Securities and Exchange Act regulating sale of securities in interstate commerce and the use of the mails, and whether a demurrer to such an indictment should not have been sustained.

The appellant in this case was neither an officer, nor a director, nor an employee of the Consolidated Mines of California. It is not charged that he mailed the stock certificates, but only that he caused the certificates to be mailed to three persons within the city and county where he lived. The evidence in the case shows not only that the corporation involved was a California corporation, operating a mine 21 miles east of Jackson, Calaveras County, California, but, also, that the stock certificates involved in this case were the personally owned stock certificates of Frank S. Tyler. The dealings were fair and honest and attended with full publicity of the Company's stock in California.

The appellant was called as a witness to testify before the Securities and Exchange Commission on behalf of the Government with reference to the Consolidated Mines of California. Thereafter the indictment charged him with having caused the three certificates to be mailed. A plea in abatement was filed to the indictment on the ground that the appellant was immune from testifying by reason of his testimony before the Securities and Exchange Commission and the provisions of Section 22(c) of the Securities Act of 1933 as amended, 15 U. S. C. A., Section 77v(c).

This appeal challenges the constitutionality of the Securities and Exchange Act with reference to personally owned stock as construed by the District Court, as being in violation of the Fifth Amendment to the Constitution of the United States, and the constitutionality of the statute as construed and applied in this case.

This appeal also raises the following questions:

I.

(a) Where a corporation is duly and regularly organized under the laws of a state, and full and fair disclosure has been made of all of the facts regarding the corporation to the state officials, and it is shown in the permit, to the satisfaction of the state authorities, that the transaction is fair, equitable and just to the investors, the said state authority being one authorized by law to investigate and pass upon the question and to receive full and fair disclosure and make it available to the public any time, is it a violation of the Securities Act of 1933 to use the mails in sending a letter from one place in Los Angeles to another place in Los Angeles without filing a registration statement with the Federal Securities and Exchange commission?

(b) Where the purpose of the Securities and Exchange Act is "to provide full and fair disclosure of the character of the securities sold in *interstate and foreign commerce and through the mails* and to prevent fraud in the sale thereof," and for other purposes, "is a prosecution of an individual who was neither an officer, director nor employee of a company for causing the mails to be used in intrastate commerce by sending stock of a state corporation duly and regularly authorized under the laws of

the state, which has made a full and fair disclosure of the character of the securities sold within that state to the duly constituted authorities, authorized by the Federal Securities and Exchange Act?

(c) Is such an interpretation of the Act holding that it is a violation of the Securities and Exchange Act, an improper interpretation, since such interpretation has no reasonable relationship to the object sought by the Act?

II.

Where stock is personally owned and it is not charged that there is anything fraudulent or improper in the sale or dealings, does an act of Congress, if construed to apply to the sale of such personally owned stock, offend the Fifth Amendment to the Constitution of the United States holding that no person can be deprived of property without due process of law?

Does such statute impair the freedom of contract guaranteed by the Constitution?

Is such an act as construed and applied unconstitutional?

III.

Where a defendant is tried by a jury and one of the vital questions is whether he owned the stock personally, and if he did, that it would be exempt under the law, does the Court invade the province of the jury by instructing them that it is immaterial whether the stock is personally owned or not?

IV.

Where the stock is part of an issue generally sold only to persons resident within a single state or territory where the issuer of such security is a person resident and

doing business within, or is a corporation incorporated by and doing business within such state or territory, is the sale of such security exempt under the act itself where the transactions which the accused is alleged to have had were all within the state and city, and where the only evidence of any other transactions are regarding isolated cases of persons who had been members of a stockholders' committee group which had had its stock in deposit within the state itself and where the transactions were finally consummated within the state?

V.

Where the only stock involved in the alleged violation was personally owned stock transferred from one owner to another and sold by the second owner, is such stock within the exemption of Section 3, Subd. 10?

VI.

Where this Court has previously held implicitly in a decision involving this company that personally owned stock is exempt is it the law of the case which the District Court is bound to follow?

VII.

Where the Court takes away from the jury the right to determine whether stock is personally owned and therefore exempt from the Securities and Exchange Act, is it an invasion of the province of the jury and reversible error?

VIII.

Where a plea in abatement is submitted to the Court and an issue of fact is raised as to whether immunity was granted by reason of the appearance by request of a per-

son before the Securities and Exchange Commission, should the demurrer to the plea in abatement be overruled and the issue submitted for trial before a jury?

IX.

Where a person is neither an officer nor an employee of a company is the evidence sufficient to show that he caused a stock certificate to be mailed from one place in Los Angeles to another place in Los Angeles solely by reason of the fact that the certificates were mailed?

X.

Is the burden of proof upon the Government to show that the stock was not one of the exempt classifications, or can it shift that burden of proof to the defense, and is the burden of proof upon the Government to prove beyond a reasonable doubt that the defendant acted without innocent intent?

E.

Cases and Sections Believed to Sustain Jurisdiction.

Title 15, Section 77v, U. S. C. A.;

Title 28, Sections 225 and 347;

Electric Bond & Share Co. v. Securities & Exchange Commission, 92 F. (2d) 580;

United States v. American Bell Telephone Co., 159 U. S. 548, 40 L. Ed. 255;

United States v. Sanges, 144 U. S. 310, 36 L. Ed. 450;

Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 48 L. Ed. 496.

MORRIS LAVINE,

Attorney for Appellant.

